SINGAPORE REPORTS

Lau Wai Mun William v Holland Grove Enterprise Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 9000 OF 1984
CHAN SEK KEONG J
7 MAY 1991

Contract — Agreement for provision of architectural services — Claims for fees — Whether plaintiff had verbally agreed to charge lower fees — Whether plaintiff represented that total cost of project would not exceed $800,000 — Whether termination by plaintiff excluded his claim

This is a claim by the plaintiff, an architect, for his fees for work done for the defendants in connection with the development of four units of two-storey luxurious flats with a swimming pool ('the project'). The claim is based on a written agreement dated 19 September 1990 ('the agreement') which was signed by both the parties. Under the agreement, the plaintiff agreed to provide his services as an architect and principal consultant. Clause 3 of the agreement provided that the plaintiff's fee would be 11% of the total cost of the project inclusive of services and installation of whatever kind. Clause 4 provided, inter alia, that on obtaining planning approval, the fee payable shall be ⅓ of the total estimated cost of the project and services/installation of whatever kind and that the fee would be payable irrespective of whether the project is proceeded with or abandoned. Planning approval for the project was obtained on or about 7 December 1981. As for the cost of the project, the plaintiff, at the request of the defendants, instructed the quantity surveyors to estimate the total cost of the project on the basis of the architectural drawings which were submitted to the competent authorities for planning approval. The quantity surveyors estimated the cost at $1,492,000.

The plaintiff has, to date, received total amount of $14,000 towards his fees under the agreement. The plaintiff says he is entitled to 11% of $1,492,000 less $14,000. The defendants disputed this claim on the grounds that (i) the plaintiff had orally agreed to charge 5% to 6%; (ii) the plaintiff had represented to the defendants that the total cost would not exceed $800,000 and proceeded on that basis; and (iii) the plaintiff had not completed stage II of the project due to the termination of services and thus fees were not due as the agreement was an entire contract.

Held, granting judgment to the plaintiff:

(1) There was no evidence that the plaintiff had orally agreed to enforce a fee of 5-6%. The defendants were only looking for an excuse not to pay his fee after they found that they did not have a viable project on their hands.

(2) On the evidence, the plaintiff had neither agreed nor represented that the total cost of the project would not exceed $800,000 and that the defendants proceeded with the project on that agreement or representation. The figure of $800,000 was not inserted into the agreement.

(3) The plaintiff was completely justified in withdrawing his services from the defendants. The defendants did not have sufficient funds to continue with the project and did not in fact proceed with the development after the plaintiff terminated his services.

Cases referred to

1 *Tyagaraja Mudaliar & Anor* v *Vedathanni* [1936] MLJ 62 (distd)
2 *Seow Kim Koi* v *Wei Yin Chen* [1968] 2 MLJ 193 (not folld)
3 *Fidas Consulting Engineering Ltd* v *Thymaras* [1985] 1 WWR 752 (refd)
4 *Nemer* v *Whitford* (1984) 33 SASR 208 (refd)
5 *Edwards & Webster* v *Coley* (1954) 104 LJ 844 (refd)
6 *Sumpter* v *Hedges* [1898] 1 QB 673 (refd)
7 *Farnsworth* v *Garrard* (1807) 170 ER 867 (refd)

Legislation referred to

Evidence Act (Cap 97, 1990 Ed) s 94

Soh Gim Chuan (*Anandarajah* with him) for the plaintiff.
Philip Jeyaretnam for the defendants.

Cur Adv Vult

Chan Sek Keong J: This is a claim by the plaintiff, an architect, for his fees for work done for the defendants in connection with the development of four units of two-storey luxurious flats with a swimming pool ('the project').

The claim is based on a written agreement dated 19 September 1980 ('the agreement') which was signed by both the parties. Under the agreement, the plaintiff agreed to provide his services as an architect and principal consultant. The services he agreed to provide were: architectural, structural engineering, electrical engineering, quantity surveyor, land surveyor and general landscaping. Except for the first and last of the said services, the plaintiff would provide the other services by appointing the appropriate professionals to perform them.

Clause 3 of the agreement provided that the plaintiff's fee would be 11% of the total cost of the project inclusive of services and installation of whatever kind. Clause 4 provided for the mode of payment as follows:

> (a) Preparation of sketch plans for owner consideration and when drawings and other documents are prepared and ready for submission to the Development Control Division for planning approval, as agreed by the owner is to pay a initial fee of $2,000 (Dollars: Two thousand only) to M/s Lau & Associates Architects. This fee includes part of the land surveyor's fee. This amount shall be deducted from the final account of our total fees.
> (b) On obtaining planning approval, the fee payable shall be ⅓ (one-third) of the total estimated cost of the project and services/installation of whatever kind. This fee payable irrespective of whether the project is proceeded with or abandoned.
> (c) When the working drawings and contract documents are prepared to a stage appropriate for the calling of tenders, the fee payable shall be another ⅓ (one-third) of the total estimated cost of the project of our fee.
> (d) The remaining ⅓ (one-third) of the fee shall be paid progressively in proportion to the supervision and construction period.

Clause 5 provided that no extra fee would be charged for amendments of the above plans to comply with the

relevant authorities, but a fee of $1,000 would be charged for any changes requested by the defendants which required the plans to be re-drawn wholly or partially and re-submitted.

The following facts are not in dispute on the evidence. Planning approval for the project was obtained on or about 7 December 1981. There were preliminary consultations with the proposed structural engineers and the quantity surveyors. Neither of them have billed the plaintiff for work done, the engineers not having proceeded to the stage of preparing structural drawings for approval, and the quantity surveyors not having evaluated any tender prices as tenders had yet to be called.

As for the cost of the project, the plaintiff, at the request of the defendants, instructed the quantity surveyors to estimate the total cost of the project on the basis of the architectural drawings which were submitted to the competent authorities for planning approval. The quantity surveyors estimated the cost at $1,342,000, excluding the following: (a) the professional fees; (b) the cost of the swimming pool. The estimate was based on the assumption that hollow blocks would be used for the walls and floor finishes would be in cement screed. The cost of the swimming pool was separately estimated to cost $150,000. As the defendants have produced no evidence to contradict the quantity surveyor's evidence, I must find that $1,492,000 was the total cost of the project for the purpose of the agreement.

The plaintiff has, to date, received the total amount of $14,000 towards his fees under the agreement. The plaintiff says that he is entitled to 11% of $1,492,000. The defendants say he is entitled to nothing on a number of grounds.

The first line of defence as pleaded was that the plaintiff had agreed to charge 5% to 6% during a site inspection in 1980 when two of the directors were present. One of them, DW3, later signed the agreement. He testified that before he signed the agreement, he discussed the fee with the plaintiff and that the plaintiff agreed to charge 5% to 6% because of 'connection' although under the SIA terms it was 11%. The reference to 'connection' was that the plaintiff's father-in-law was a good friend of the father of DW3 and that the job was given to the plaintiff on account of that friendship. DW3 said that he did not ask the plaintiff to insert the correct figure because he trusted the plaintiff.

DW3's evidence has to be contrasted with the defendants' statement on the fee of 11% as set out in their letter dated 12 April 1982 to the plaintiff after the latter had decided to terminate his services. The relevant part of the letter read:

> You have misused your father-in-law's good character, our relationship and the esteemed and trusted profession as an architect to trick Mr Robert Lim [DW3] into believing that the letter of appointment with the 11% fee is just a normal requirement by the Singapore Institute of Architects. A quick check with any small or medium architectural firm would be able to offer the 5-6% fee.

In my view, this letter said it all. It suggested that the plaintiff had taken advantage of DW3 to charge a fee of 11%. There is no allegation that there was an oral agreement to enforce only 5-6%. This version of how the 11% fee came about is different from the version that was pleaded as the defence and is also different from the account given by DW3 in the witness box. I am unable to give credibility to a defence that has three different versions.

I believe and therefore accept the evidence of the plaintiff on this point. He said that everything had been agreed before the agreement was prepared by him and signed by DW3. He had no reason to insert 11% if the agreed fee was 5-6%. I find that the defendants were only looking for an excuse not to pay his fee after they found that they did not have a viable project on their hands.

In view of my finding on the evidence, it is unnecessary for me to consider whether DW3's oral evidence is admissible to contradict the terms of the agreement. However, as counsel for the parties have submitted on the law, I shall make some observations on this point. Counsel for the defendants relied on *Tyagaraja Mudaliar* v *Vedathanni*,[1] a decision of the Privy Council on ss 91 and 92 of the Indian Evidence Act (which are in pari materia with ss 93 and 94 of our Evidence Act (Cap 97, 1990 Ed)). In that case, there was a written agreement whose object was to evidence the undivided status of the family. However, it also purported to provide for the maintenance of the respondent, but on the understanding that the agreement for maintenance would not be enforced as it was not final. Subsequently, the respondent applied for maintenance and the appellant sought to use the agreement against her. The Privy Council held that s 92 of the Indian Evidence Act had no application as the respondent was not trying to contradict, vary, add to or subtract from the agreement, and that s 91 did not prevent oral evidence from being admitted to show that there was no agreement at all.

Tyagaraja's case[1] was applied by Choor Singh J in *Seow Kim Koi* v *Wei Yin Chen*[2] where it was held that oral evidence was admissible to prove that the actual monthly rent in respect of rent-controlled premises the sub-tenant had agreed to pay to the tenant was $230 and not $100 as written in the tenancy agreement on the ground that the figure of $100 was fictitious and a sham. He found that the true rent was $230 and that the figure of $100 was put in to prevent the landlord from finding out that the tenant was receiving more than 110% of the standard rent, thus rendering the tenant liable to be ejected by the landlord. Counsel for the

defendants relied on *Seow Kim Koi*'s case[2] as authority for the proposition that oral evidence was admissible to prove that a party has agreed not to enforce a term of written agreement and accordingly, the defendants were entitled to adduce oral evidence to prove that the plaintiff had agreed not to enforce the 11% but only 5-6%.

With respect, I do not think that the principle in *Tyagaraja*'s case[1] was applicable in *Seow Kim Koi*'s case.[2] In *Tyagaraja*'s case,[1] the issue was whether there was an agreement for maintenance at all (and that was why s 91 was held not applicable), and not whether the maintenance was X rupees or Y rupees (and that was why s 92 was also held not applicable). The issue in *Seow Kim Koi*'s case[2] was not the existence of the tenancy agreement at all, but whether the monthly rent, which was a term of the tenancy agreement, was $100 or $270. The submission of counsel for the defendant seeks to apply a principle relevant to determining the existence or otherwise of an agreement to a case where the issue is the existence or otherwise of a term in a written agreement. The cases are not analogous.

In my view, if *Seow Kim Koi*'s case[2] is authority for the argument of counsel for the defendants, it needs to be re-examined, as otherwise in every dispute of this nature, every oral term which contradicts a written term will become admissible by formulating the nature of the disagreement as whether there is an oral agreement not to enforce a written term and not whether it is or can be contradicted by oral evidence, thus rendering completely ineffective the object of s 94 of the Evidence Act. I do not think that this is the law, as is illustrated by Illustration (b) to s 94 of the Evidence Act as follows:

> A agrees absolutely in writing to pay B $1000 on 1st March 1893. The fact that at the same time an oral agreement was made that the money should not be paid till 31st March cannot be proved.

This brings me to the second line of defence which was that the defendants proceeded with the project upon the plaintiff's agreement or representation that its total cost would not exceed $800,000 and, as that was not possible on the plans and drawings prepared by him, he was not entitled to any remuneration for his services. Counsel for the defendants cited the following authorities: *Fidas Consulting Engineering Ltd* v *Thymaras*[3] and *Nemer* v *Whitford*.[4] The defendants relied on the testimony of DW3 and some letters to support this allegation. The plaintiff denied this. He said that the defendants wanted luxurious duplex houses. He said that his initial estimate was $1.6m and that he revised it to $1.3m on or about 9 September 1981 when he was required to provide this information in a planning statistics form to be sent to the competent authority. DW3's evidence was that he did not know anything about this figure as it was put in after he had signed the form.

My finding on this issue is that the plaintiff had neither agreed nor represented that the total cost of the project would not exceed $800,000 and that the defendants proceeded with the project on that agreement or representation. If that were true, the figure of $800,000 would have been inserted in the agreement. The defendants' story was made up of bare allegations. Whether or not the defendants knew about the estimate of $1.3m stated in the planning statistics form is, in my opinion, irrelevant to the plaintiff's case. If he had agreed to the cost of $800,000, there was no reason for him to insert $1.3m. Indeed, it was consistent with his evidence that he had not agreed to a budget of $800,000. The defendants' allegation on this point is contradicted by their own words when they wrote to the plaintiff on 12 April 1982 and said, inter alia, as follows:

> Our earlier budget *given to you in early 1981* after both appeals have been unsuccessful but to proceed on the two-storey duplex flats was to develop below $800,000. Now, you come up with an estimate of $1,492,000. Do you sincerely and honestly think that this is a viable project at this cost + your 11% fee + financing cost + compensation cost to squatter OR are you trying to skin a cat? (Emphasis added.)

On the evidence, I find that after planning approval had been given, the defendants tried to obtain banking facilities to finance the development but were unsuccessful as they could not provide a detailed estimate of their costs. They then instructed the plaintiff to obtain a detailed estimate from the quantity surveyors, for which they would pay the plaintiff the sum of $350 in consulting the quantity surveyor. This fee was paid. On 14 January 1982, the quantity surveyor submitted his report which gave an estimate of $1,492,000. The defendants found that the estimate was too high and accordingly, at a meeting held on 11 January 1982, they instructed the plaintiff to budget $150,000 for each unit, without the swimming pool. On 20 January 1982, they changed their mind and instructed the plaintiff to budget $200,000 for each unit. Because they were not giving firm instructions to the plaintiff, he on 1 February 1981 wrote to the defendants for confirmation on the final budget. They confirmed the proposed budget of $800,000 on 8 February 1982. The defendants have tried to rely on this letter as evidence that the budget of $800,000 was advised by the plaintiff. I find to the contrary, as is evident from the terms of the letter and the confirmation. If the plaintiff had represented to the defendants that the budget for the development would not exceed $800,000, this request for confirmation would have been unnecessary.

The third line of defence is that the plaintiff was not entitled to any fee because stage II of the project was not completed due to the plaintiff's termination of his services. Counsel for the defendant submitted that this was an entire contract. He cited the following authorities:

Edwards & Webster v *Coley*[5] and *Sumpter* v *Hedges.*[6] He also submitted that the plaintiff was not entitled to a claim by way of quantum meruit because the defendants did not make use of the plans he had prepared. He cited *Farnsworth* v *Garrard*[7] and *Sumpter* v *Hedges.*[6] Stage II of the project was the preparation of detailed drawings of the duplex units, including the structural drawings, for the approval by the competent authorities, followed by the award of the construction.

In my view, this is another unmeritorious defence. On the evidence, it was abundantly clear that the defendants did not have sufficient funds to continue with the project. As a result they placed an advertisement in the Straits Times to sell the land. DW3 said that the intention was to test the market. That, of course, could mean anything from selling it at an acceptable price to finding out what price the market would offer. But the fact remained that they did not proceed with the development after the plaintiff had terminated his services. The land was sold a few years later. The plaintiff said that he decided to terminate his services when he was given the run around when he asked for payment of his fees and when he saw the defendants' advertisement. The plaintiff wrote to the defendants giving his reasons for terminating his services. The defendants have never alleged that he was in breach of contract in so terminating. On the evidence, the plaintiff was completely justified in withdrawing his services from the defendants.

The final defence is that the plaintiff was not entitled to 11% of the total cost of the project but only 7.5% as on his own evidence the remaining 3.5% was intended for the other consultants. It was submitted that he could only recover in respect of any consultant whom he had paid for work done in relation to the project. In my view, this is also a bad defence. The terms of the agreement were very clear. He was entitled to be paid ⅓ of his fee on obtaining planning approval. It was common knowledge that at the stage of planning approval, only architectural work was required and not the services of structural engineers or quantity surveyors or other consultants. Accordingly, if the plaintiff had intended to charge only ⅓ of 7.5% as his fee up to the planning approval stage, he would have expressly provided for that fee. In view of the terms of the agreement, the question of quantum meruit does not arise. Nor, for the same reason, can it be implied that his fee would be reduced to 7.5% because the other consultants had not rendered any service to the project at that stage. The defendants have adduced no evidence to show what the practice was among the profession in relation to the matter in dispute or to show that ⅓ of 11% of the total cost of the project was exorbitant in relation to the amount of work the plaintiff would have put in up to that stage of the development.

There will be judgment for the plaintiffs in a sum equivalent to ⅓ of 11% of $1,492,000 less $14,000 with interest at the rate of 6% from the date of the writ to the date of judgment, and costs.

Order accordingly.

Solicitors: *LJ Wong Soh & Partners; Robert WH Wang & Woo.*

Reported by *Kevin Mathews*

Haw Par Brothers International Ltd & Anor v Jack Chiarapurk & Ors

HIGH COURT (SINGAPORE) — SUIT NO 1060 OF 1990
CHAO HICK TIN J
1 MARCH 1991

Civil Procedure — Interim injunction — Whether should be varied or discharged — Balance of convenience test

Companies and Corporations — Director's duties — Revelation of trade secrets — Breach of duties — Companies Act (Cap 50, 1990 Ed), s 157

Companies and Corporations — Members' rights — Right to have illegal acts restrained — Companies Act (Cap 50, 1990 Ed), s 409A

Companies and Corporations — Joint venture company — Duty of participants not to compete

Tort — Passing-off — Similarity of get-up — Whether will lead to confusion and deception

In October 1971, a joint venture agreement ('JVA') was entered into between the first plaintiff, C, and the first defendant with a view to reorganizing and expanding the Tiger Balm trade marks business of the first plaintiff. Under this agreement, two companies were formed: HPEAT (in Singapore) and HPTBI (in Hong Kong) (together referred to as the 'joint companies'). The first plaintiff and Chia Holdings (HK) Ltd were equal shareholders in the joint companies. The first defendant was also appointed managing director and chief executive of the joint companies, and at the date of judgment still held that appointment. The first plaintiff later transferred its shares in the joint companies to the second plaintiff. C similarly transferred its shares in the joint companies to the second and third defendants. All the transferees agreed to be bound by the JVA as if they were the original parties thereto. The first defendant had a substantial shareholding in the second defendant. The third defendant is a subsidiary of the second defendant.

Under the JVA, the first plaintiff agreed to grant licences to the joint companies to use the Tiger Balm brand trademarks and to manufacture, market and distribute the Tiger Balm products in the ASEAN countries, Hong Kong, Macau, Burma, Japan, Korea, the Pacific islands and in the Middle East. Pursuant to the JVA, certain companies controlled by the first defendant were also engaged to manufacture the Tiger Balm products of the joint companies. The JVA expired on 31 December 1991.